

**U.S. Department of Labor**

Office of Administrative Law Judges  
Heritage Plaza Bldg. - Suite 530  
111 Veterans Memorial Blvd  
Metairie, LA 70005

(504) 589-6201  
(504) 589-6268 (FAX)



**Issue Date: 20 May 2004**

**Case No.: 2003-ST A-45**

**In the Matter of:**

**MICHAEL M. HILBURN,**  
Complainant

**vs.**

**JAMES BOONE TRUCKING,**  
Respondent

**APPEARANCES:**

**BRADLEY S. ODOM, ESQ.,**  
For Complainant

**GEORGE R. MEAD, II, ESQ.,**  
For Respondent

**BEFORE: RICHARD D. MILLS**  
**Administrative Law Judge**

**RECOMMENDED DECISION AND ORDER OF DISMISSAL**

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act) and the implementing regulations thereunder at 29 C.F.R. Part 24.

This claim is brought by Michael Hilburn, Complainant, against his former employer, James Boone Trucking ("JBT"), Respondent. Mr. Hilburn alleges that he was improperly terminated by Respondent on March 18, 2002. This matter was referred to

the Office of Administrative Law Judges for a formal hearing. On December 9, 2003, both parties were given the opportunity to offer testimony, documentary evidence, and oral arguments. The following exhibits were received into evidence<sup>1</sup>:

- 1) Complainant's Exhibits Nos. 1-8, 15-17.
- 2) Respondent's Exhibits Nos. A-D.

After giving full consideration to the entire record, evidence introduced, and arguments presented, the Court makes the following Findings of Fact, Conclusions of Law, and Recommended Order.

### **STIPULATIONS<sup>2</sup>**

After an evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

- (1) Jurisdiction exists under the STAA in this case.
- (2) Complainant was employed by Respondent from June 1999 until March 18, 2002.

### **ISSUES**

The unresolved issues in this proceeding are:

- (1) Whether Complainant engaged in protected activity under the Act; and
- (2) Whether Respondent took adverse employment action against Complainant due to this protected activity.

### **SUMMARY OF THE EVIDENCE**

At the formal hearing, the Court received testimony from Michael Hilburn, Bret Stewart, James Walker, Brian Young, Karen Campbell, and Lane VanIngen. The following is a summary of each witness' testimony.<sup>3</sup>

---

<sup>1</sup> The following abbreviations will be used in citations to the record: CTX – Court's Exhibit, CX – Complainant's Exhibit, RX – Respondent's Exhibit, and TR – Transcript of the Proceedings.

<sup>2</sup> TR. 6.

<sup>3</sup> Exhibits will be cited to the extent they add or differ from the witness' testimony.

## **MICHAEL M. HILBURN**

Mr. Hilburn testified that he was employed by JBT as a truck driver beginning in 1999. TR. 17-18. Mr. Hilburn testified that he was employed by JBT to transport general cargo and hazardous materials in trucks in excess of 10,001 pounds. TR. 18. Mr. Hilburn testified that he was terminated by JBT on March 18, 2002, for refusing to drive in violation of a hours-of-service regulation from Charlotte, North Carolina to Auburndale, Florida. TR. 95, 104.

Prior to working at JBT, Mr. Hilburn had worked in trucking for about 20 years. TR. 18. Mr. Hilburn understood that his on-duty time as a truck driver was limited to 70 hours for every eight days and 15 hours for every 24 hours. TR. 19. Mr. Hilburn also understood that his driving time was limited to 10 hours for every 24 hour period and that an eight hour break is required after each ten hour driving session. TR. 19.

Audits from JBT of Mr. Hilburn's drive times indicate that Mr. Hilburn had numerous 70-hour, 15-hour, and 10-hour violations during the months leading up to his firing. TR. 21-30; CX-1. The audit results revealed five violations of the rules in October 2001, twelve violations in November 2001, seventeen violations in December 2001, and six violations in January 2002. TR. 21-30; CX-1. Mr. Hilburn also had thirteen speeding violations from October 2001 to January 2002. TR. 22; CX-1. Mr. Hilburn testified that these speeding violations usually resulted from logging less time on runs than he actually spent, in order to keep from violating the hours-of-service rules. TR. 22.

Mr. Hilburn testified that JBT never discussed these violations with him and that he has never received any disciplinary action from JBT as a result of the audits. TR. 27-30. Mr. Hilburn further testified that he was not aware of any other drivers or dispatchers being disciplined by JBT based on violations found in JBT's audits. TR. 27-28, 31.

Mr. Hilburn admitted to fabricating his log records in order to appear in compliance with the hours-of-service rules. TR. 63. Mr. Hilburn testified that he was frequently instructed by JBT Safety Director Karen Campbell and JBT Safety employee Wilda Bowie, in the December 2001 to January 2002 timeframe, to log his loading/unloading time as 15 minutes, the minimum allowed, even if the loading/unloading took longer. TR. 26-27, 106-07. Mr. Hilburn testified that Ms. Campbell and Ms. Bowie directed him to do so in order to make available to him more on-duty hours. TR. 26. Mr. Hilburn testified that Ms. Campbell and Ms. Bowie also instructed him to log his fuel pumping time as only 15 minutes to conserve time. TR. 64, 106-07.

Mr. Hilburn testified that while JBT did not otherwise directly instruct him to falsify his log books, he was indirectly instructed to do so by Ms. Campbell and Ms.

Bowie. TR. 64, 106-07. Mr. Hilburn explained that when he complained about being over-hours, he was directed by Ms. Campbell, Ms. Bowie, and his dispatchers to get a new log book and do whatever he needed to do. TR. 107. Mr. Hilburn testified that he understood these instructions to mean that he needed to re-work his log book to appear under-hours. TR. 107. Mr. Hilburn testified that he followed Ms. Campbell and Ms. Bowie's instructions. TR. 107.

Mr. Hilburn testified that he spoke to Ms. Campbell in February 2002 about his hours-of-service violations. TR. 26, 31. According to Mr. Hilburn, Ms. Campbell responded that she could not do anything about the problem and that Mr. Hilburn had to speak with his dispatchers. TR. 31. Mr. Hilburn testified that when he would notify his dispatchers, including his primary dispatcher Laurel Shiflett, that he was over-hours, the dispatchers would nevertheless direct him to complete his runs. TR. 31-32. Mr. Hilburn testified that no changes resulted from his complaints to Karen Campbell and the dispatchers. TR. 31. Mr. Hilburn testified that he has been written up by JBT when he fails to deliver a load timely, but not when committing over-hours violations. TR. 73.

Mr. Hilburn testified that he refused a dispatch on March 15, 2002 from Charlotte, North Carolina to Auburndale, Florida because he was over-hours with respect to the 70-hour rule. TR. 55-56. Regarding the days leading up to March 15, 2002, Mr. Hilburn estimated his driving and on-duty time, based in part on his old driving logs. Mr. Hilburn testified that he kept some of his driver's logs while he threw away others. TR. 112-13. According to Mr. Hilburn, there was no design in which ones he kept and which ones he threw out. TR. 113. Mr. Hilburn utilized an average speed of 50 m.p.h. for his travel estimates. TR. 40, 43. Mr. Hilburn explained that there are mountains to ascend and descend, speed limits, small roads through towns, and other complications that limit one's traveling speed. TR. 40-41, 70-71. Mr. Hilburn acknowledged that his wage records indicate that he traveled fewer miles than the estimated mileage he set forth before the Court. TR. 44-45. Mr. Hilburn explained that his wage records document the mileage driven based on automobile miles rather than the mileage an over-the-road truck would require. TR. 44-45. According to Mr. Hilburn, over-the-road trucks must travel more roundabout routes in some instances because of their size and length, thereby increasing the actual mileage traveled. TR. 44-45.

Mr. Hilburn testified that he spent 1.4 hours on March 3, 2002, performing a pre-trip inspection and traveling 62 miles from Seminole, Alabama to Brewton, Alabama. TR. 80; CX-6. Mr. Hilburn then spent 18 hours picking up a load, pumping fuel, traveling 842 miles from Brewton to Kansas City, Missouri, and unloading in Kansas City. TR. 81-82; CX-6. From Kansas City, Mr. Hilburn spent 0.6 hours performing a pre-trip inspection and traveling 22 miles to Bonner Springs, Kansas. TR. 82-83; CX-6. Mr. Hilburn then spent 18.7 hours picking up his load in Bonner Springs, pumping fuel, traveling 813 miles from Bonner Springs to Atlanta, Georgia, and unloading in Atlanta. TR. 83-84; CX-6. From Atlanta, Mr. Hilburn spent 0.8 hours performing a pre-trip

inspection and driving 31 miles to Peachtree City, Georgia. TR. 84-85; CX-6. Mr. Hilburn next spent 14.9 hours picking up a load in Peachtree City, pumping fuel, driving 648 miles to Medley, Florida, and unloading in Medley. TR. 85; CX-6. Mr. Hilburn then spent 6.5 hours driving 244 miles from Medley to St. Petersburg, Florida, picking up a load in St. Petersburg, and performing a pre-trip inspection. TR. 85-86; CX-6. From St. Petersburg, Mr. Hilburn spent 10.5 hours pumping fuel, driving 492 miles to Mobile, Alabama, and getting unloaded in Mobile. TR. 86-87; CX-6. Mr. Hilburn then spent one hour traveling 41 miles from Mobile to back to Seminole, arriving in Seminole on March 7, 2002. TR. 87; CX-6.

From March 10, 2002 through March 15, 2002, Mr. Hilburn estimated that he was on-duty for 99 hours. TR. 36-52. Specifically, Mr. Hilburn estimated that it took him 1.4 hours to perform a pre-trip inspection of his truck and drive about 50 miles from Pensacola, Florida to Brewton, Alabama; 17.7 hours to get loaded in Brewton, to pump fuel, to drive about 803 miles from Brewton to Plymouth, Indiana, and to get unloaded in Plymouth; 15.6 hours to perform a pre-trip inspection, to pick up another load in Plymouth, to drive about 722 miles from Plymouth to Charlotte, North Carolina, and to get unloaded in Charlotte; 11.8 hours to perform a pre-trip inspection, to pick up another load in Charlotte, to pump fuel, and to drive 481 miles from Charlotte to Mt. Vernon, Ohio; 1.9 hours to perform a pre-trip inspection and to drive about 86 miles from Mt. Vernon, Ohio to Bellevue, Ohio to pick up a load; 22.2 hours to pick up the load in Bellevue, to pump fuel, to drive about 952 miles from Bellevue to Saraland, Alabama, and to unload in Saraland; 1.2 hours to do a pre-trip inspection and to drive from Saraland to Seminole, Alabama; 12.4 hours to pick up a load in Seminole, to drive about 562 miles from Seminole to McAdenville, North Carolina, and to get unloaded in McAdenville; 2.3 hours to drive from McAdenville to Charlotte, to pick up a load in Charlotte, to drive about 83 miles from Charlotte to Inman, South Carolina, and to unload in Inman; and 2.8 hours to pick up another load in Inman, to pump fuel, and to drive back to Charlotte; and 11.7 hours picking up a load in Charlotte and driving about 577 miles from Charlotte to Seminole. TR. 36-58; CX-4.

Mr. Hilburn testified that prior to making his run from McAdenville to Charlotte on March 15, 2002, Mr. Hilburn notified Laurel Shiflett that he was out of hours. TR. 23-24, 52. Mr. Hilburn testified that Ms. Shiflett continued to dispatch him nonetheless, advising Mr. Hilburn that the freight had to be delivered and to do the best he could with his hours and avoid getting caught. TR. 23-24, 53. According to Mr. Hilburn, Ms. Shiflett dispatched him from McAdenville to Charlotte, and then further dispatched him to from Charlotte to Inman. TR. 23-24, 53. Mr. Hilburn testified that he was then dispatched from Inman back to Charlotte. TR. 23-24, 55.

Mr. Hilburn testified that after he arrived in Charlotte from Inman, he was dispatched by Ms. Shiflett to Auburndale, Florida, near the Tampa area. TR. 23-24, 55-56. Mr. Hilburn testified that he was dispatched to Auburndale on a Friday, March 15th,

and had until 7:00 a.m. the following Monday morning, March 18th, to deliver the load. TR. 104. Mr. Hilburn testified that he refused Ms. Shiflett's dispatch to Auburndale because he was over hours. TR. 23-24, 56. Mr. Hilburn testified that he asked to speak to JBT's head dispatcher, Andy Walker, but was told by Ms. Shiflett that Mr. Walker was busy. TR. 56. Mr. Hilburn testified that he told Ms. Shiflett that he wanted to get back to JBT headquarters to speak with management about running him in violation of the hours-of-service rules. TR. 56-57. According to Mr. Hilburn, Ms. Shiflett indicated that Mr. Hilburn could make the run to Auburndale or drive back to the Seminole yard and drop off his truck. TR. 57. Mr. Hilburn testified that he then drove back to Seminole in order to meet with his managers. TR. 57, 104. Mr. Hilburn acknowledged that he committed an hours-of-service violation when he drove back to Seminole. TR. 103. Mr. Hilburn opined that it was closer from Charlotte to Seminole than it was from Charlotte to Auburndale. TR. 115. Mr. Hilburn did not recall anyone being in the yard at the time of his return to Seminole. TR. 89. Mr. Hilburn testified that after arriving at the Seminole yard, he dropped off his truck and went home. TR. 89.

Mr. Hilburn testified that he returned to the Seminole yard on Monday morning and spoke to Karen Campbell about the illegal doctoring of his log books and his hours-of-service issues. TR. 89. Mr. Hilburn testified that Ms. Campbell told him she was not able to do anything about those issues and that Mr. Hilburn would have to speak to his dispatchers. TR. 89-90. Mr. Hilburn testified that he was then asked to go back to speak with Brian Young, JBT's General Manager, and Andy Walker, JBT's Operations Manager/Head Dispatcher. TR. 90-91.

Mr. Hilburn testified that he spoke to Mr. Young and Mr. Walker and told them about his hours-of-service issues. TR. 91. According to Mr. Hilburn, Mr. Young and Mr. Walker responded simply that JBT had freight to haul and needed drivers who would haul the freight. TR. 91. Mr. Hilburn testified that he did not mention weekend duty during his conversation with Mr. Young and Mr. Walker. TR. 92. Mr. Hilburn explained that he had no problems with performing runs on weekends and that he had actually done so for JBT in the few weeks prior to his termination. TR. 19, 92. Mr. Hilburn also testified that prior to working at JBT, he had worked weekends quite a bit and would sometimes be required to be away from his family two months at a time. TR. 18-19. Mr. Hilburn testified that he did not quit JBT, explaining that he had no other job prospects at the time and needed the job to support himself and his wife. TR. 93.

### **BRET STEWART**

Mr. Stewart worked for JBT as a truck driver from September 2001 until February 2002. TR. 118-19. Mr. Stewart testified that he was fired from JBT because he was seen buying beer and putting it in his truck. TR. 126.

Mr. Stewart testified that he sometimes doctored his log books in order to avoid over-hours violations. TR. 121. Mr. Stewart testified that he was never asked directly by JBT to operate in excess of his maximum allowable hours. TR. 121-22. However, Mr. Stewart testified that he was advised by his dispatchers, despite him being over-hours, that his runs had to be completed. TR. 121-22. Mr. Stewart explained that when he notified his dispatchers, including Laurel Shiflett and Andy Walker, that he was short on hours, the dispatchers advised him that the runs needed to be made and that he knew what he had to do. TR. 121-24.

Mr. Stewart testified that during one incident, he was dispatched from Columbus, Ohio at about 5:00 p.m. to arrive in Jacksonville, Florida by 9:00 a.m. the next morning. TR. 123. Mr. Stewart testified that he informed Mr. Walker that he did not have the hours necessary to legally complete the run. TR. 123. According to Mr. Stewart, Mr. Walker advised him that the load had to be delivered and that Mr. Stewart needed to do what was necessary to complete the delivery. TR. 123-24. Mr. Stewart testified that he completed the run, having to run illegally to do so. TR. 124. Mr. Stewart testified that he sometimes felt that his job was on the line during the incidents in which he was indirectly instructed to run over-hours, including the Columbus-Jacksonville incident. TR. 124-25.

### **JAMES A. WALKER**

Mr. Walker goes by "Andy." TR. 129. Mr. Walker has been the Operations Manager at JBT for about the past three years. TR. 129. Mr. Walker testified that he has never told anyone to complete a run without regard for the hours-of-service rules. TR. 207. According to Mr. Walker, if a driver notifies a dispatcher that the driver is low on hours, then the dispatcher will relay the information Mr. Walker. TR. 208-09. Mr. Walker testified that he would then discuss with the driver the number of hours the driver still has available, and Mr. Walker would dispatch the driver to something feasible. TR. 209.

Mr. Walker testified that Mr. Hilburn's dispatch to Auburndale was communicated to Mr. Hilburn by Laurel Shiflett, but that Mr. Walker was the person responsible for dispatching Mr. Hilburn to Auburndale. TR. 199. Mr. Walker explained that Ms. Shiflett communicated the dispatch to Mr. Hilburn and put Mr. Hilburn on hold after Mr. Hilburn refused to make the run. TR. 199-200. Mr. Walker testified that Ms. Shiflett then informed Mr. Walker of Mr. Hilburn's refusal. TR. 199-200. Mr. Walker testified that he instructed Ms. Shiflett to tell Mr. Hilburn that no one else was available to make the run and that Mr. Hilburn needed to make the delivery by Monday. TR. 200. Mr. Walker testified that Ms. Shiflett informed Mr. Hilburn of this information and that Mr. Hilburn hung up after telling Ms. Shiflett that he was returning to the Seminole yard. TR. 201. Mr. Walker testified that Ms. Shiflett did not indicate to Mr. Walker that Mr.

Hilburn was complaining about being over-hours. TR. 200, 202. Mr. Walker testified that he himself did not speak to Mr. Hilburn during this conversation. TR. 200.

Mr. Walker testified that he next had contact with Mr. Hilburn on Monday morning, March 18th, in a meeting involving Mr. Hilburn, Mr. Walker, and Brian Young. TR. 203. According to Mr. Walker, Mr. Hilburn did not mention any problems about hours-of-service in this meeting. TR. 203, 205. Mr. Walker testified that he did not know Mr. Hilburn had hours-of-service issues. TR. 207.

According to Mr. Walker, Mr. Hilburn indicated during the meeting that Mr. Hilburn would not work weekends for the small amount of pay Mr. Hilburn was receiving. TR. 203. Mr. Walker testified that in speaking to Mr. Hilburn, Mr. Hilburn was threatening, agitated, and continued asking, "What are you going to do about it?" TR. 203. Mr. Walker testified that Mr. Hilburn finally was told by Mr. Young to clean out Mr. Hilburn's truck. TR. 204. Mr. Walker testified that Mr. Hilburn responded, "Well, it's been fun. Now we're going to have some real fun." TR. 204. Mr. Walker testified that Mr. Hilburn was fired because Mr. Hilburn refused to drive on weekends and because of Mr. Hilburn's conduct in the meeting. TR. 206.

Mr. Walker testified that prior to March 18, 2002, Mr. Walker had not had a problem with Mr. Hilburn concerning working on weekends. TR. 130, 207. Mr. Walker also testified that, prior to this meeting, he had not heard Mr. Hilburn complaining about having to work on a weekend. TR. 130, 206.

Mr. Walker testified that a driver's average driving speed on the interstate should be 60 to 65 m.p.h. TR. 210-11.

## **BRIAN YOUNG**

Mr. Young is the General Manager at JBT. TR. 134-35. Mr. Young testified that he has never told anyone to falsify records and that he was not aware of anybody at JBT ever telling drivers to falsify their records. TR. 148. Mr. Young testified that he maintains the original logs for drivers for six months, as required by law. TR. 142.

Mr. Young testified that JBT uses a computer system to audit its drivers' hours/log violations. TR. 137. Mr. Young explained that the system works as follows: JBT's drivers turn in their logs, the log information is entered into the computer system, and the computer system computes an audit of the log information. TR. 138-39. Mr. Young testified that the computer audits are given to the drivers to notify the drivers of their violations and to allow the drivers to work on their problems with their dispatchers. TR. 137, 175. Mr. Young testified that the computer audits are done for JBT's internal purposes only and that Mr. Young has never taken disciplinary action against any employee because of JBT's internal audits. TR. 138, 172-73. According to Mr. Young,

the mere reporting of a violation by the computer system does not indicate how substantial the violation was. TR. 139. Mr. Young testified that a violation listed on an audit could therefore be for as little as one second. TR. 139.

Mr. Young testified that Mr. Hilburn's audit violations are large relative to JBT's other drivers. TR. 138. Mr. Young testified that he did not take any disciplinary action against anyone, including dispatchers and Mr. Hilburn himself, when Mr. Hilburn's audits from October 2001 to January 2002 revealed numerous hours-of-service violations. TR. 151-56. Mr. Young testified that he also did not speak to Mr. Hilburn nor Mr. Hilburn's dispatchers regarding the results of the audits. TR. 152-56. Likewise, Mr. Young did not take any action to investigate the seriousness of the violations. TR. 151-56. Mr. Young explained that it was the responsibility of JBT drivers to keep their own hours and that Mr. Hilburn should have brought the issue to JBT. TR. 153-155. According to Mr. Young, Mr. Hilburn never complained about running over-hours. TR. 152, 175. Mr. Young testified that he was not aware that Mr. Hilburn had any problems in conjunction with the hours-of-service rules. TR. 163.

Mr. Young testified that a Department of Transportation audit in August 2002, resulting from a worker's complaint, revealed that 6 drivers were found in violation of the 70-hour rule. TR. 158; CX-8. Although Mr. Young testified that he found these violations unacceptable, Mr. Young did not discipline anyone as a result of the DOT audit, including the drivers involved. TR. 161-63.

With respect to penalization for DOT violations, Mr. Young testified that JBT has a safety/performance bonus that is paid quarterly to its drivers, based on the number of miles completed by the driver. TR. 175. Mr. Young testified that these bonuses may be reduced if the driver has DOT shutdowns, log violations, or other discrepancies. TR. 175. In addition, Mr. Young testified that a dispatcher would be terminated for dispatching a driver after the driver reports being out-of-hours. TR. 137. Mr. Young testified, however, that he has never terminated any dispatcher for running drivers over-hours. TR. 148, 150, 171. In addition, while Mr. Young testified that JBT drivers have been shut down for driving over-hours, Mr. Young himself has never shut down any driver. TR. 137.

Mr. Young testified that he terminated Mr. Hilburn for refusing on Friday, March 15, 2002, to deliver a load to Auburndale, Florida. TR. 164-65. Mr. Young testified that he was not a party to any conversations between Mr. Hilburn and the dispatchers on March 15th. TR. 165. Mr. Young testified that the delivery time for the Auburndale load was 7:00 a.m. on Monday, March 18th. TR. 143. Mr. Young contended that Mr. Hilburn had the hours necessary to deliver the Auburndale load by Monday morning. TR. 169. Mr. Young testified that Mr. Hilburn was not dispatched to return the Auburndale load to the Seminole yard and that Mr. Hilburn went 500 miles off route in doing so, costing JBT about \$500.00. TR. 143-44.

Mr. Young testified that he terminated Mr. Hilburn on the morning of March 18, 2002, during a meeting involving Mr. Hilburn, Mr. Young, and Mr. Walker. TR. 135, 164. Mr. Young testified that during this meeting, Mr. Young asked Mr. Hilburn why Mr. Hilburn did not deliver the load to Auburndale. TR. 136. According to Mr. Young, Mr. Hilburn complained that he would not stay out on weekends for the “piddley amount of money” Mr. Hilburn was being paid. TR. 136. Mr. Young testified that he told Mr. Hilburn that a driver must make a run when dispatched to do so and that JBT could not have drivers dictating their preferences to management. TR. 136, 166, 169. Mr. Young testified that Mr. Hilburn was angry and upset and continued stating, “What you going to do about it?” TR. 136. Mr. Young testified that he finally told Mr. Hilburn to clean out his truck, to which Mr. Hilburn responded, “Been fun, but now it gets real fun.” TR. 136.

Mr. Young testified that Mr. Hilburn never mentioned during the meeting any hours-of-service issues. TR. 170. Likewise, Mr. Young testified that Laurel Shiflett never indicated that Mr. Hilburn had raised an hours-of-service issue at the time Mr. Hilburn was dispatched to Auburndale. TR. 148.

With respect to Bret Stewart’s firing, Mr. Young testified that a witness reported Mr. Stewart entering his truck with a six-pack of beer. TR. 149. According to Mr. Young, Mr. Stewart stated that he was not going to drink the beer until he reached his destination. TR. 149. Mr. Young testified that he fired Mr. Stewart nonetheless, for having alcohol in the truck. TR. 149.

### **KAREN CAMPBELL**

Ms. Campbell testified that she is the Safety Director at JBT. TR. 176-77. Her duties include hiring drivers, keeping drivers in DOT compliance, and maintaining JBT’s permits. TR. 177. Ms. Campbell testified that JBT drivers are expected to turn in their driving logs on a weekly basis. TR. 177. Their log information is then entered into JBT’s computer system, and a monthly audit is performed of each driver’s logs. TR. 177. Ms. Campbell testified that the computer system relies on the drivers’ logs so that an error in the logs would be incorporated into the audits. TR. 184. Ms. Campbell also testified that the internal auditing system only documents the fact that an hours-of-service violation occurred and does not document the seriousness of the violation. TR. 183. According to Ms. Campbell, the audits are maintained by JBT for six months. TR. 188-89.

Ms. Campbell testified that she receives the audits about 30 days after they are formulated and in turn provides the audits to the drivers. TR. 177. Ms. Campbell testified that each driver is supposed to sign his/her audit and return it to the Safety Department if a problem is indicated. TR. 177, 192-93. Ms. Campbell testified that if

there is a problem, then the Safety Department will work with the driver to get the problem resolved. TR. 178. Ms. Campbell testified that Mr. Hilburn never came to her to discuss the results of his audits. TR. 179.

Ms. Campbell testified that she speaks to a driver if she is aware that the driver has an hours-of-service problem. TR. 193. Ms. Campbell testified that in such instances, she would counsel the driver and allow the driver time off to catch up on hours, if necessary. TR. 198. Ms. Campbell testified that she did not speak to Mr. Hilburn or take any disciplinary action against him for his hours-of-service violations. TR. 193-94. Ms. Campbell testified that she did not have any conversations with Mr. Hilburn about his hours-of-service during the week prior to Mr. Hilburn's termination. TR. 181-82. Ms. Campbell testified that she also did not speak with Mr. Hilburn on the date of Mr. Hilburn's termination. TR. 182.

Ms. Campbell testified that she also did not speak to any dispatchers about any of the hours-of-service violations reflected in Mr. Hilburn's monthly audits. TR. 194. Ms. Campbell testified that JBT advances hours-of-service compliance by instructing its drivers that they must track their hours and must inform their dispatchers about any problems. TR. 196. Ms. Campbell testified that the dispatchers do not keep up with the drivers' hours. TR. 196. Ms. Campbell testified, however, that she reminds dispatchers on a daily basis to be cognizant of hours-of-service issues. TR. 196.

Ms. Campbell testified that the average quarterly performance bonus for a driver is \$300.00. TR. 180. Ms. Campbell testified that a driver's performance bonus is reduced when the driver is found to have hours-of-service, speeding, or other violations while on the road. TR. 180-81, 198. These reductions are made for violations detected while on the road, and are not imposed based on the findings of JBT's internal audits. TR. 180-81.

## **LANE VANINGEN**

Mr. VanIngen testified that he currently owns and is the President of Transportation Safety Services ("TSS"), a consulting company for DOT compliance. TR. 213. Mr. VanIngen testified that he works as TSS' expert. TR. 213.

Prior to TSS, Mr. VanIngen worked for the DOT as a special agent investigator for safety. TR. 213-14. Mr. VanIngen's last position with the DOT was as an Area Manager in Mobile, Alabama. TR. 214. As an Area Manager, Mr. VanIngen did field investigations and handled various programs within his 75-mile jurisdiction. TR. 214. Mr. VanIngen testified that during this work, he regularly conducted transportation audits and regularly dealt with hours-of-service issues. TR. 214.

On August 7, 2002, while Mr. VanIngen was still employed by the DOT, Mr. VanIngen formulated a DOT report relating to JBT. TR. 222, 228-29; CX-8. In the report, Mr. VanIngen concluded that Mr. Hilburn was in violation of the 70-hour rule from March 9-16, 2002. TR. 222, 228-29. Mr. VanIngen's DOT report occurred within six months of Mr. Hilburn's termination. TR. 231; CX-8. Mr. VanIngen testified that he therefore likely had Mr. Hilburn's original log sheets for early March at the time the DOT report was formulated. TR. 234.

However, Mr. VanIngen testified that, after being hired by JBT as a consultant, Mr. VanIngen again reviewed Mr. Hilburn's log records for March 10th through March 18th, as well as additional records relating to Mr. Hilburn's work for the period in question, including fuel reports and "miscellaneous-type" documents. TR. 219, 222. Mr. VanIngen now concludes that Mr. Hilburn was not out-of-hours at the time of his Auburndale dispatch and could have legally completed his dispatch to Auburndale. TR. 222. For his consulting work, Mr. VanIngen was paid \$125.00 per hour by JBT. TR. 229.

Mr. VanIngen testified that he was not provided logs for the 8-day period preceding March 15, 2002. TR. 223. Mr. VanIngen testified that he therefore was not sure of Mr. Hilburn's standing on March 15th with respect to the 70-hour rule. TR. 223. Mr. VanIngen testified nonetheless that Mr. Hilburn's trip back to Seminole on the night of Friday, March 15th, was apparently the actual event that put Mr. Hilburn over-hours for the preceding 8-day period. TR. 223.

For his conclusions as a JBT consultant, Mr. VanIngen did not rely on JBT's driver compensation sheets, explaining that he did not know whether or not those records were accurate. TR. 230. Mr. VanIngen explained that he could not verify that the trips outlined in Mr. Hilburn's compensation records actually took place on the dates indicated. TR. 230. Mr. VanIngen testified that he also did not consider JBT's internal audits regarding Mr. Hilburn. TR. 232-33.

Mr. VanIngen testified that absent a tracking system, there is no direct way to track a driver's time other than through the driver's logs. TR. 220-21. Mr. VanIngen testified that JBT does much more than most companies to maintain driver compliance with hours-of-service rules. TR. 224. Mr. VanIngen testified that if JBT were truly concerned about hours-of-service violations, then Mr. VanIngen would expect someone from JBT to speak to a driver who is working over-hours. TR. 233. Mr. VanIngen testified that he did not talk to anyone at JBT about whether JBT spoke to their employees about JBT's internal audit results.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact and conclusions of law are based upon the Court's observations of the appearance and demeanor of the witnesses at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. Frady v. Tennessee Valley Authority, 92-ERA-19, (Sec'y Oct. 23, 1995) (Slip Op. at 4). As the trier of fact, the Court may accept or reject all or any part of the evidence and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). To the extent that credibility determinations must be made, the Court bases its credibility findings on a review of the entire testimonial record and exhibits, with due regard for the logic of probability and the demeanor of the witnesses.

To prevail on an STAA retaliatory action, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under 49 U.S.C. § 31105. A complainant initially must show that he engaged in a protected activity under § 31105. Next, the complainant must prove that adverse employment action was taken against him and that the adverse employment action was likely motivated by the protected activity. Roadway Exp., Inc. v. Brock, 830 F.2d 179, 181 (11th Cir. 1987). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The burden then shifts back to the complainant to prove that the proffered reason was not the true reason for the adverse action. St. Mary's Honor Center v. Hicks, 125 L.Ed. 2d 407, 416 (1993); Moyer v. Yellow Freight System, Inc., 89-STA-7 (Sec'y Oct. 21, 1993). Remedies available to prevailing STAA Complainants include affirmative action to abate the violation, reinstatement of the former position with the same pay, terms, and privileges of employment, compensatory damages with back pay, and reasonably incurred attorney's fees and costs. 49 U.S.C. § 31105 (b)(3).

### **I. PROTECTED ACTIVITIES**

Under the Act, the Complainant must initially show that he engaged in a protected activity under 49 U.S.C. § 31105. A protected activity is established under 49 U.S.C. § 31105 (a)(1) by proof that:

- (A) the employee...has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
- (B) the employee refuses to operate a vehicle because—
  - (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(2) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

Under Subsection (A), a protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, or standard. Reed v. Nat'l Minerals Corp., 91-STA-34 (Sec'y, July 24, 1992).

The Court finds that Mr. Hilburn did not engage in protected activity under 49 U.S.C. § 31105 (a)(1)(A), despite Mr. Hilburn's testimony that he made internal complaints to JBT management about driving in violation of hours-of-service regulations. Mr. Hilburn must prove by a preponderance of the evidence that he actually made such internal complaints. See Williams v. CMS Transportation Services, Inc., 94-STA-5 (Sec'y October 25, 1995). Mr. Hilburn testified that he raised a concern with Karen Campbell, JBT's Safety Director, in February 2002 regarding Mr. Hilburn's hours-of-service violations. TR. 26, 31. Mr. Hilburn testified that Ms. Campbell indicated she could not do anything about the problem and that Mr. Hilburn was to resolve the issue with his dispatchers. TR. 31. Mr. Hilburn testified that he again complained to Ms. Campbell about hours-of-service issues on March 18, 2002, just prior to Mr. Hilburn's meeting with Andy Walker and Brian Young. TR. 89. According to Mr. Hilburn, Ms. Campbell indicated again that Mr. Hilburn was to resolve that issue with his dispatchers. TR. 89-90. Mr. Hilburn also testified that he raised hours-of-service issues in his meeting with Mr. Walker and Mr. Young, just before Mr. Hilburn was terminated. TR. 91.

However, the record is devoid of any evidence or written documentation from any source supporting Mr. Hilburn's testimony. See Williams, 94-STA-5 (Sec'y October 25, 1995). In addition, the testimony of Karen Campbell, Andy Walker, and Brian Young refuted Mr. Hilburn's testimony about raising hours-of-service concerns. See id.; TR. 170, 179, 181-82, 193-94, 203, 205. Karen Campbell testified that Mr. Hilburn never raised an hours-of-service issue with her. TR. 179, 181-82, 193-94. Ms. Campbell also testified that she did not speak with Mr. Hilburn at all on the day Mr. Hilburn was fired. TR. 182. Mr. Walker and Mr. Young both testified that Mr. Hilburn did not raise any hours-of-service issues in the meeting that ultimately resulted in Mr. Hilburn's termination. TR. 170, 203, 205. The Court finds Ms. Campbell, Mr. Walker, and Mr. Young equally as credible as Mr. Hilburn. Therefore, based on the foregoing, Mr. Hilburn has failed to carry his burden of proving by a preponderance of the evidence that he actually made internal complaints to JBT management.

The Court also finds that Mr. Hilburn has failed to prove that he engaged in protected activity under 49 U.S.C. § 31105 (a)(1)(B). Under 49 U.S.C. § 31105 (a)(1)(B), a driver is protected in refusing to drive a dispatch that contemplates a violation of the hours-of-service regulations, including 49 C.F.R. § 395.3. See Paquin v. J.B. Hunt Transport, Inc., 93-STA-44 (Sec’y, July 19, 1994). 49 C.F.R. § 395.3 indicates in part that, “no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive...Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.” 49 C.F.R. § 395.3 (b)(2). In order to be protected under the Act, a complainant who refuses to drive because doing so would violate an hours-of-service regulation must prove by a preponderance of the evidence that such hours-of-service violation would have actually occurred. See Brunner v. Dunn’s Tree Service, 1994-STA-55 (Sec’y, Aug. 4, 1995).

In this case, Mr. Hilburn asserts that he engaged in protected activity when he refused his March 15, 2002 dispatch from Charlotte, North Carolina to Auburndale, Florida because such a run would have caused him to violate the 70-hours provision under 49 C.F.R. § 395.3. The Court finds that Mr. Hilburn’s refusal of the Auburndale dispatch did not constitute protected activity under the Act because Mr. Hilburn has failed to carry his burden of proving that the Auburndale run would have actually caused him to exceed 70-hours of on-duty time for 8 consecutive days.<sup>4</sup>

The Auburndale run was to be completed by 7:00 a.m. on Monday, March 18, 2002. TR. 104, 143. Neither party submitted any evidence as to the distance or driving time from Charlotte to Auburndale. Assuming that the Charlotte-Auburndale trip would have taken longer than 7 hours,<sup>5</sup> the 8-day periods of relevant evaluation are from March 10th through March 17th and from March 11th through March 18th. After considering all the evidence regarding Mr. Hilburn’s on-duty time for these 8-day periods, the Court finds that Mr. Hilburn, had he made the Auburndale run, would have logged close to 70 hours during these periods. However, the evidence is too inexact to prove whether

---

<sup>4</sup> Respondent asserts that Mr. Hilburn’s refusal to take the Auburndale dispatch also did not constitute protected activity because Mr. Hilburn subsequently drove back to the Seminole yard, admittedly in violation of the 70-hour rule. TR. 103. However, the fact that Mr. Hilburn subsequently decided to drive back to Seminole did not make his refusal of the dispatch to Auburndale any less of an activity protected under 49 U.S.C. § 31105 (a)(1)(B). See Palmer v. Western Truck Manpower, 85-STA-6 (Sec’y, January 16, 1987); but cf. Zurenda v. J & K Plumbing & Heating Co., 97-STA-16 (ARB June 12, 1998)(finding that a complainant did not engage in protected activity under § 31105 (a)(1)(B) when he initially complained about unsafe conditions in his truck but subsequently drove his truck nonetheless).

<sup>5</sup> An Internet search using Yahoo! indicated that the driving distance from Charlotte to Auburndale was about 570 miles. In order to complete the run within 7 hours, Mr. Hilburn would have had to average about 81 m.p.h.

Mr. Hilburn would have been at, above, or below 70-hours for these periods. Because Mr. Hilburn carries the burden of proving that the Auburndale run would have actually caused him to violate the 70-hour rule, the Court finds that Mr. Hilburn has failed to meet his burden.

During his testimony before the Court, Mr. Hilburn estimated that he was on-duty from March 10, 2002 through March 15, 2002 for 87.5 hours.<sup>6</sup> TR. 36-58; CX-4. Based on Mr. Hilburn's estimate, he would not have had enough hours to complete the Auburndale run, even if he logged no on-duty time for March 16th and March 17th. However, for the following reasons, the Court finds that Mr. Hilburn's estimate of his on-duty time beginning March 10th is too speculative to carry his burden of proving that the Auburndale run would have actually caused him to violate the 70-hours rule.

First, in making his estimation of 87.5 hours, Mr. Hilburn relied only upon his recollection, experience as a truck driver, JBT's wage records, and Mr. Hilburn's admittedly fabricated driver's log for March 10th-15th. With respect to his recollection, Mr. Hilburn's estimate before the Court took place on December 9, 2003, about one year and nine months after the March 10th-15th period in question. The Court finds that Mr. Hilburn's recollection is not a reliable means for determining his on-duty time given the length of time that had passed since March 10th.

Mr. Hilburn also contended that JBT's wage records did not accurately reflect the actual number miles he drove from March 10th-15th, explaining that his wage records document the mileage driven in automobile miles rather than the number of miles an over-the-road truck would have to travel. TR. 44-45. Therefore, Mr. Hilburn relied on his experience as a truck driver to estimate the actual mileage he drove in his truck. TR. 44-45. Mr. Hilburn estimated that he actually drove 230 miles more than indicated in his wage records, or 3,873 miles compared to the 3,643 reflected in his wage records for March 10th-15th.<sup>7</sup> TR. 36-58; CX-2; CX-3; CX-4; CX-16. Without independent proof that Mr. Hilburn actually drove 230 miles more than reflected in his wage records, the Court finds that Mr. Hilburn's estimate of 3,873 miles driven is merely an approximation and too speculative to be accepted as fact.

Mr. Hilburn had JBT's wage records and his driver's log from March 10th-15th to guide his estimation. TR. 35. However, Mr. Hilburn's total on-duty time estimate was based on mileage figures that did not correspond to his wage records, making his wage records a guide merely of when and where he drove rather than how far and for how long

---

<sup>6</sup> This figure excludes the 11.5 hours Mr. Hilburn spent driving from Charlotte back to the Seminole yard, after Mr. Hilburn refused to run the Auburndale dispatch.

<sup>7</sup> These figures do not include the mileage Mr. Hilburn traveled from Charlotte to Seminole after refusing the Auburndale dispatch.

he drove. In addition, Mr. Hilburn admitted that he doctored his driver's logs, making his driver's log in CX-2 dubious as a document that would accurately guide his after-the-fact estimation.

Second, Mr. Hilburn's on-duty time estimation was based on an assumption that his average driving speed for March 10th-15th was 50 m.p.h., which Mr. Hilburn described as "doing pretty good." TR. 40, 43. Mr. Hilburn explained that there are mountains to ascend and descend, speed limits, small roads through towns, and other complications that limit one's traveling speed. TR. 40-41, 70-71. The only other evidence as to the speed a driver should average on the road came from Andy Walker, JBT's Operations Manager, who indicated that the average speed for a driver using the Interstate should be 60-65 m.p.h. TR. 210-11. The problem with both Mr. Hilburn and Mr. Walker's submission of the average speed for a driver is that both figures are approximations and neither figure reflects the actual average speed of Mr. Hilburn from March 10th-15th. Without Mr. Hilburn's actual average speed, any re-construction of his actual on-duty time is fundamentally flawed.

Third, Mr. Hilburn's estimation of his time spent on pre-trip inspections, loading/unloading, and pumping fuel was not based on any documentation. Mr. Hilburn estimated that he spent 10 hours from March 10th-15th on these activities. However, neither Mr. Hilburn's wage records nor his driver's log for March 10th-15th indicate when or for how long Mr. Hilburn performed these activities. For the reasons stated above concerning the flawed footing of Mr. Hilburn's on-duty time estimation, the Court likewise finds that the 10-hour estimate is too speculative to be credited as fact.

As discussed in the foregoing, Mr. Hilburn's on-duty time estimation simply involves too much conjecture to be credited as fact.<sup>8</sup> Without more, Mr. Hilburn has failed to carry his burden of proving that he actually would have exceeded 70 hours of on-duty time if he had taken the Auburndale run. Therefore, the Court finds that Mr. Hilburn did not participate in protected activity, under 49 U.S.C. § 31105 (a)(1)(B), when he refused the Auburndale dispatch.

---

<sup>8</sup> The question of whether Mr. Hilburn would have actually exceeded 70 hours for either March 10th-17th or March 11th-18th is too close a calculation to determine based on approximation. Using Mr. Hilburn's estimation that he drove 3,873 miles from March 10th-15th, Mr. Hilburn at an average speed of 50 m.p.h. would have spent 77.46 hours driving. However, based on Andy Walker's assessment that Mr. Hilburn could have averaged 65 m.p.h. and JBT's wage records that indicate Mr. Hilburn drove only 3,643 miles from March 10th-15th, Mr. Hilburn would have spent only 56.05 hours driving. Likewise, using Mr. Hilburn's estimation that he drove 3020 miles from March 11th-15th, Mr. Hilburn at an average speed of 50 m.p.h. would have spent 60.4 hours driving. Using JBT's wage records indicating Mr. Hilburn drove 2,853 miles, Mr. Hilburn at an average speed of 65 m.p.h. would have spent only 47.55 hours driving. Depending on the amount of time Mr. Hilburn actually spent from March 10th-15th on pre-trip inspections, loading/unloading, and fuel, Mr. Hilburn may have been able to legally log a portion of the Auburndale drive—assuming that the run was about 570 miles—on Sunday, March 17th and the remaining portion on Monday, March 18th before the 7:00 a.m. delivery time. Because the calculation is a close one, there is not sufficient room for error such that the issue could be resolved based on approximation.

## II. CONCLUSION AND RECOMMENDED ORDER

Mr. Hilburn failed to prove that he engaged in a protected activity. Specifically, Mr. Hilburn failed to prove by a preponderance of the evidence that he made internal complaints about hours-of-service violations to JBT management prior to his termination. Mr. Hilburn also failed to prove by a preponderance of the evidence that he would have actually violated an hours-of-service regulation had he delivered his dispatch to Auburndale, Florida. As such, Mr. Hilburn is not entitled to any remedy for his STAA claim.

Accordingly, the Court recommends that Mr. Hilburn's claim be **DISMISSED**.

**So ORDERED.**

A

**RICHARD D. MILLS**

Administrative Law Judge